RHB BANK BHD v. TAN LEONG HUAT

COURT OF APPEAL, PUTRAJAYA
HANIPAH FARIKULLAH JCA
LEE SWEE SENG JCA
SEE MEE CHUN JCA
[CIVIL APPEAL NO: P-01(A)-202-03-2020]
4 FEBRUARY 2024

Abstract – *Disguised demotion amounts to constructive dismissal and amounts to a fundamental breach of contract on the part of the employer entitling the employee to resign. Therefore, in considering a case of constructive dismissal, the court ought to apply the 'contract test' and not the 'unreasonable test', in that, it is not the unreasonable conduct of the employer that should be focused on but instead, whether the employer's conduct was 'repudiatory' of the contract of employment.*

LABOUR LAW: *Dismissal – Constructive dismissal – Employee transferred to new position without significant difference from previous role and experience – Test to be applied – Whether 'contract test' and not 'unreasonableness test' – Whether Industrial Court ('IC') considered bone fide and reasonableness of employer's conduct – Whether IC should have considered whether there was breach of contract – Whether constructive dismissal established – Whether proper legal test applied*

The respondent was employed by the appellant as its Vice-President, Operation Head, Thailand Operations. When the appellant opened a second branch in Sri Racha, it was also placed under the supervision of the respondent. Subsequently, the appellant embarked on an expansion plan to enlarge Thailand operations wherein the opening of a third branch was envisaged. One Ms Marina Chin was appointed to the enhanced role of Head of Country Operations and she was required to oversee the combined operations of the Bangkok, Sri Racha and the envisaged Ayutthaya branches. With her appointment, the respondent's role became redundant. At the same time, as the appellant was experiencing difficulties in securing a branch manager for the intended Ayutthaya branch, and to expedite its opening, asked the respondent to assume the role of Branch Manager of the Ayuthaya Branch until a suitable Thai national was appointed to the role. The respondent did not protest the short-term assignment. Once a suitable Thai national was secured to assume the role of Branch Manager of the Ayuthaya Branch, the respondent was informed that he would be repatriated to Malaysia and he would be transferred to Internal Infrastructure, PMO and Operations Support, Group International Business ('GIB'). The respondent was informed that: (i) his personal grade and terms and conditions of employment would remain unchanged; and (ii) he was to report to the Head, International Infrastructure, PMO and Operations Support who would outline his duties and responsibilities. The respondent objected to his

repatriation to Malaysia and failed to report for duty as instructed and, subsequently, deemed himself as unfairly dismissed. The appellant refuted the respondent's allegations of unfair dismissal and directed the respondent to report to work immediately, failing which the appellant would assume that the respondent had abandoned his employment with the appellant. The respondent maintained his claim for constructive dismissal and thereafter, presented a complaint for unfair and constructive dismissal. The appellant, on the other hand, claimed that the respondent, by failing to report to duty, had abandoned his employment. The Industrial Court ('IC') held that the respondent had proven that he was constructively dismissed on a balance of probabilities. The High Court affirmed the IC award and dismissed the appellant's application to quash the award. Hence, this appeal.

Held (allowing appeal; setting aside High Court decision)
Per Hanipah Farikullah JCA delivering the judgment of the court:

(1) Constructive dismissal arises when an employee is forced to leave the job against their will driven by the employer's conduct. In constructive dismissal, the issue is primarily the conduct of the employer and not the conduct of employee – unless waiver, estoppel or acquiescence is in issue. The notion of constructive dismissal comes from the concept that 'An employer must not, without reasonable or proper cause, conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee'. (para 30)

(2) The test, based on the settled principles that was to be applied when assessing a claim for constructive dismissal, had not been correctly applied by the IC and the High Court. The correct test to apply is whether there was a fundamental breach of the express or implied terms of the contract of employment. The principles and test was stated by the Court of Appeal in *CIMB Bank Bhd v. Ahmad Suhairi Mat Ali & Anor*, where the court referred to an earlier case of *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* and reiterated that the conduct complained of must be measured against the 'contract test' and not the 'unreasonableness test'. The IC did not apply the contract test. The IC had gone into the *bona fide* and reasonableness of the appellant's conduct instead of considering whether there was a breach of contract when the respondent was transferred by the appellant to GIB. Hence, the IC had erred in law in failing to apply the proper legal test in a case of constructive dismissal. (paras 35, 36, 38, 41, 45, 46 & 50)

(3) The IC also held that the respondent was constructively dismissed by the appellant based on the ground that the job scope as branch manager in Bangkok and at the GIB were significantly different. However, the appellant's evidence that the scope of work that will be assumed by the respondent in GIB was not significantly different from the respondent's role as Head, Thailand Operations and his previous experiences,

remained unchallenged by the respondent. Findings of facts made with no evidence to support the same in the decision-making process, were clearly errors of law which warranted those findings being interfered by the higher courts. (paras 47-49)

Case(s) referred to:
CIMB Bank Bhd v. Ahmad Suhairi Mat Ali & Anor [2023] 9 CLJ 345 CA ***(refd)***
Courtaulds Northern Textiles Ltd v. Andrew [1979] IRLR 84 ***(refd)***
Quah Swee Khoon v. Sime Darby Bhd [2001] 1 CLJ 9 CA ***(refd)***
Southern Investment Bank Bhd/Southern Bank & Anor v. Yap Fat & Anor [2017] 8 CLJ 159 CA ***(refd)***
Western Excavating (ECC) Ltd v. Sharp [1978] IRLR 27 ***(refd)***
Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298 SC ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, s. 20

For the appellants - N Sivabalah & Jamie Goh; M/s Shearn Delamore & Co
For the respondent - Devanathan Seperamaniam, Jec Siose & Chen Hui Ken; M/s Jec Siose & Co

[Editor's note: Appeal from High Court, Pulau Pinang; Judicial Review Application No: PA-25-26-06-2019 (overruled).]

Reported by S Barathi

JUDGMENT

Hanipah Farikullah JCA:

Introduction

[1] The present matter was an appeal by RHB Bank Berhad (the appellant) against the order of the High Court Judge which had dismissed the appellant's application for judicial review to quash the Industrial Court's Award No 1026 of 2019 dated 25 March 2019.

[2] On 25 March 2019, the Industrial Court allowed claims for constructive dismissal brought by the respondent, who was required to relocate to Malaysia from Bangkok, where he had previously worked.

[3] On 26 February 2020, the High Court dismissed the appellant's application for judicial review of the Industrial Court's decision.

[4] This case raises an important question on constructive dismissal: whether the conduct of an employer who is said to have committed a fundamental breach of the contract employment is to be judged by the contract test or unreasonableness test.

A **The Background Facts**

[5] The facts which are not in dispute for the purposes of this appeal are as follows. The respondent was employed by the appellant on 13 June 2011 as its Vice-President, Operation Head, Thailand Operations.

B **[6]** The respondent was posted to the Bank's Thailand Operations as its Operation Head in Bangkok and was required to report to the Head of Thailand Operations, Mr Thiti Musawan and subsequently to the Thailand Country Head, Mr Wong Kee Poh.

[7] In November 2013, the appellant opened a second branch in Sri Racha
C and it was also placed under the supervision of the respondent.

[8] In 2014, the appellant embarked on an expansion plan to enlarge Thailand operations wherein the opening of a third branch was envisaged. In view of this expansion plan, the appellant felt that a more senior and experienced candidate was required to assume the role of steering the
D enhanced and expanded Thailand operations.

[9] Sometime in June 2014, Ms Marina Chin Yoke Fong ("Ms Marina Chin") was appointed to the enhanced role of head of country operations, and she was required to oversee the combined operations of the Bangkok, Sri Racha and the envisaged Ayutthaya branches. With her appointment, the
E respondent's role became redundant.

[10] At the same time, the appellant was experiencing difficulties in securing a branch manager for the intended Ayutthaya Branch, and to expedite its opening, taking into consideration the respondent's past
F experience, he was asked to assume the role of branch manager of the Ayuthaya Branch until a suitable Thai national was appointed to the role ('first transfer order')

[11] The respondent did not protest the short-term assignment as the branch manager of the Ayutthaya Branch. The respondent was informed by Mr U
G Chen Hock, Executive Director of Group International Business of the following:

(i) the assignment would not exceed nine months;

(ii) his terms and conditions of employment would remain unchanged; and

H (iii) the appellant will secure a suitable position for him within the group upon completion of the short-term assignment.

[12] Premised on the agreement of the respondent to assume the role of the branch manager of the Ayutthaya Branch, the said branch was opened in November 2014. Sometime in early 2015, the appellant successfully secured
I a suitable Thai national to assume the role of branch manager of the Ayuthaya Branch, and Ms Irin Chanonthiensink ("Ms Irin") commenced employment on 16 March 2015.

[13] In view of the foregoing, by letter dated 13 February 2015, the respondent was informed that he would be repatriated to Malaysia and he would be transferred to Internal Infrastructure, PMO and operations support, Group International Business ("GIB") with effect from 1 March 2015. The respondent was also informed that:

(i) his personal grade and terms and conditions of employment would remain unchanged; and

(ii) he is to report to the head, International Infrastructure, PMO and operations support who will outline his duties and responsibilities.

[14] Because of its relevance to the arguments addressed to us, we now set out in a little more detail some *inter partes* correspondence between the parties.

[15] The transfer letter to the respondent is as follows:

RHB

PRIVATE & CONFIDENTIAL

13 February 2015

Mr. Tan Leong Huat
Present

Dear Mr. Tan,

TRANSFER

Referring to the transfer clause in our Letter of Appointment to you dated 20 May 2011, you may be transferred or seconded to any company within the Group depending on the needs of the Group, as may be determined by the Management.

As communicated and notified by Mr. U Chen Hock, Executive Director/ Head, Group Retail Banking to you on 12 February 2015 in accordance with your repatriation to Malaysia, please be informed you will be transferred to International Infrastructure, PMO and Operations Support, Group International Business with effect from 01 March 2015.

You shall report directly to the Head, International Infrastructure, PMO and Operations Support who will outline your duties and responsibilities, set your objectives and manage your performance. Further take note that your Personal Grade and your terms and conditions of employment will remain unchanged.

We look forward to your continuous support and positive commitment towards the Bank's performance.

Thank you.

Yours faithfully,

JAMALUDDIN BIN IBRAHIM
Group Chief Human Resource Officer
Group Human Resource

Copy: Mr. U Chen Hock – Executive Director/ Head, Group Retail Banking
Mr. Hang Chang Nowe - Head, International Infrastructure, PMO and Operations Support

[16] The respondent responded to the transfer letter by a letter dated 25 February 2015 which states as follows:

25th February 2015

Tan Leong Huat
RHB Bank Berhad, Thailand
Bangkok, Thailand

Encik Jamaluddin bin Bakri
Group Chief Human Resource Officer
Group Human Resource
Malaysia

Dear Encik Jamal

SUBJECT: - TRANSFER

I refer to above subject matter and your letter dated 13th February 2015 duly signed by you.

Firstly, I would like to draw your attention to my OFFER OF EMPLOYMENT as per the bank's letter of offer dated 20th May 2011 with position title Operations Head, Thailand Operations. My acceptance of the said offer notwithstanding the scope of duties and transfer clause, the reason I was hired in the first instance was to ensure the following:-

a) Smooth running of the whole Thailand operations back office;
b) Growing the deposits (subsequently deposit team was set up in Sept 2013) to support the growth of the bank's loan portfolio
c) Compliance and adherence to group policies as per manual
d) Consistently to avoid repeated audit finding and enhance the credit work process of back office to support the business unit in meeting customers' needs.

Based on the above and more than my 19 years of experience namely in operations, sales deposits and credit administration were put to good use in carry out my daily job functions.

I was in fact excited when the bank open new branches in 2013 and 2014 respectively, in addition when management introduce Head of Country Operations, Thailand in June 2014 it signifies my future plan based on succession planning for my career growth in RHB Thailand.

As such, the latest transfer directive to Infrastructure, PMO and Operations Support Division will kill my career as it is a broad based monitoring, assisting branches from compliance of peripheral / equipment to RHB Group corporate culture and carry out paper work for adhoc projects for international branches outside Malaysia which may be different in nature and not consistent with my present position. Basically, engagement with customers are not the norm thus effectively this is not what I expected when I took up this job with RHB Bank Berhad.

Secondly, I wish to reiterate that it is not my intention to commit insubordination or go against the terms of my employment but nevertheless, there is simply no reasonable justification for the latest transfer after the first instant transfer direction given only near completion of four (4) months ago. On the evening of 11th Feb 2015 @ 6.36 pm (Thailand time) my Executive Director from Group International Business, Mr U Chen Hock called me up to inform of my imminent transfer by reporting to work in Group International Business and transfer effective 1st Mar 2015 accordingly. He added that since I did not wish to work in Ayutthaya branch and he was informed by my Country Head, Mr Wong Kee Poh is not happy with my work performance at the branch thus decided to bring me back to Group International Business. I explained to him that while being reassign to Ayutthaya branch for short assignment of nine (9) months, it is progressing since my branch submitted sales field report and business activity consistently to Country Head and Finance Manager on daily basis for the tracking of sales results ie. Opening of deposits account. On 12th February 2015, after our monthly MANCO meeting our Country Head called me and Khun Jirapong, temporary Branch Manager of Sri Racha branch and Chin Yoke Fong, Head of Country Operations for a meeting. I seek clarification from Mr Wong Kee Poh, Country Head but that was not the case when I confronted him. Mr. Wong confirmed instead that he never conveyed what Mr U Chen Hock told you and that he knows nothing of U Chen Hock's allegation.

A

I wish to state that in fact, Encik Jamal we also spoke before the issuing of my first transfer to Ayutthaya branch effective 20th October 2014 signed by Mr U Chen Hock and so you accordingly, I stated overwhelmingly that the said transfer itself was actually part of the process to eliminate me from the bank by Mr U Chen Hock resulting in the first transfer letter being worded as short assignment for a period of 9 months only. Prior to spoken to you, when Mr U Chen Hock during early October 2014 when he with our management to visit Bank of Thailand, I manage to have an appointment to have a heart to heart talk about the transfer. I had stated the challenges of being appointed as branch manager where I strongly stated (which I also email to En Jamal on the two (2) points via email dated 17th Oct 2014) namely

B

C

I) Lack of knowledge and confident in steering corporate loans

II) Language barrier and staff whom employed cannot speak English

D

Nevertheless, Mr U Chen Hock was kind enough to pacify me that he had already instructed Acting Country Head Mr Wong Kee Poh (pending applying his work permit) to quickly find a local Branch Manager to take charge rather than myself as my purpose sent over to Ayutthaya branch is to start up for nine (9) months only. In fact, I also shared with Mr U Chen Hock that during May 2014, via Career Move Volume 20, En Suhaimee (staff who work in Thailand and speak fluent thai) did apply whom Mr U Chen Hock informed he had no idea. I forward to En Jamal the proof and acknowledge by your goodselves on 16th Oct 2014 although he said otherwise. When I received the short assignment letter despite the difficulties highlighted, I still chose to abide by the direction given.

E

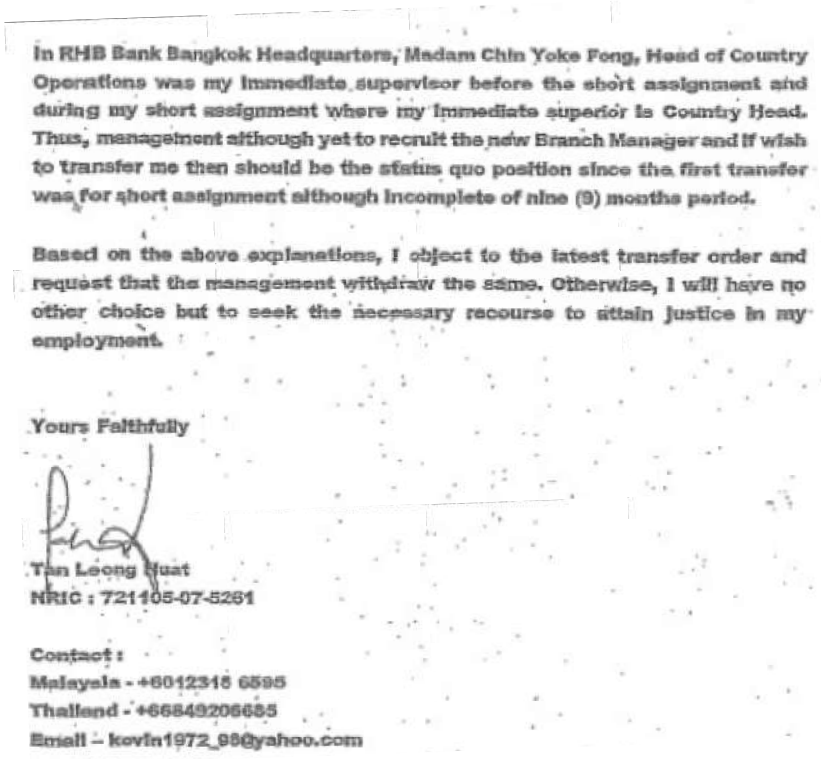
F

From the branch opening since 17th Nov 2014 till todate, under my leadership with only 6 staff (including myself) comprises only 2 young junior sales deposit executive, one cashier, one teller and an operation executive we manage to bring in 26 deposit customers totaling THB20.69 million and visited more than 12 companies surrounding the Rojana Industrial Zone. No SME or Relationship Manager were recruited for my branch compare to another new branch. Consequently, I persevered to find prospective customer in Rojana Industrial area with so far as mentioned managed to procure 12 companies with a least a quarter potential loan customer.

G

H

I



In RHB Bank Bangkok Headquarters, Madam Chin Yoke Fong, Head of Country Operations was my immediate supervisor before the short assignment and during my short assignment where my immediate superior is Country Head. Thus, management although yet to recruit the new Branch Manager and if wish to transfer me then should be the status quo position since the first transfer was for short assignment although incomplete of nine (9) months period.

Based on the above explanations, I object to the latest transfer order and request that the management withdraw the same. Otherwise, I will have no other choice but to seek the necessary recourse to attain justice in my employment.

Yours Faithfully

Tan Leong Huat
NRIC : 721105-07-5251

Contact :
Malaysia - +6012316 6595
Thailand - +66849206685
Email – kevin1972_98@yahoo.com

[17] The respondent objected to his repatriation to Malaysia and failed to report for duty as instructed on 1 March 2015. Subsequently, by letter dated 2 March 2015, the respondent deemed himself as unfairly dismissed.

[18] By a letter dated 6 March 2015, the appellant refuted the respondent's allegations of unfair dismissal and directed the respondent to report for work immediately, failing which the appellant would assume that the respondent had abandoned his employment with the appellant.

[19] The respondent by a letter dated 9 March 2015 maintained his claim for constructive dismissal. Finally, the appellant claimed that the respondent, by failing to report to duty on 2 March 2015, had abandoned his employment.

Industrial Court Proceedings

[20] The respondent, following the alleged termination of his employment with the appellant by constructive dismissal, presented a complaint for unfair and constructive dismissal. The Industrial Court held that the respondent had on fact on a balance of probabilities proven that he was constructively dismissed.

[21] We confine ourselves to those parts of the reasoning of the Industrial Court which are relevant to the constructive dismissal issue. The Industrial Court found that:

(i) the act of transferring the respondent was not done *bona fide*; and

(ii) the fact that the respondent was issued a transfer without specifying his position at the GIB had affected his morale and reputation.

[22] The Industrial Court was also of the view that the job scope as a branch manager and at the GIB are significantly different. Therefore, the Industrial Court found that the respondent had proven that he was constructively dismissed and ruled that the respondent was dismissed without just cause and excuse and ordered the appellant to pay back wages and compensation *in lieu* of reinstatement amounting to RM216,840.

[23] The appellant then applied to the High Court for judicial review to quash the award. The appellant contended that the award was liable to be quashed as there was error of law in the decision of the Industrial Court.

Decision Of The High Court

[24] The High Court Judge dismissed the appellant's application to quash the award and affirmed the said award. The grounds relied by the High Court are as follows:

> [25] Saya dapati bahawa isu-isu berkenaan dengan pemecatan konstruktif terhadap responden pertama telah dibutirkan, didengar, diteliti dan dipertimbangkan serta diputuskan oleh responden kedua dengan sewajarnya.
>
> 26. Beliau telah memutuskan tindakan di hadapan beliau dengan menilai fakta-fakta yang relevan dan mengambilkira tentang fakta-fakta yang diplidkan dan dikemukakan di hadapan beliau. Responden kedua telah membuat keputusan dengan tidak melampaui bidangkuasanya.
>
> 27. Saya juga dapati Pemohon gagal memberi alasan-alasan untuk membuktikan bahawa Awad yang diberikan itu adalah tidak sah (illegal), tidak wajar (irrational) dan salah prosedur (procedural impropriety).
>
> 28. Saya dapati Responden Kedua telah melaksanakan budi bicaranya dan kuasanya mengikut prinsip undang-undang terpakai. Responden Kedua tidak terkhilaf dari segi undang-undang dan fakta dan bertindak di dalam bidangkuasanya di dalam memberi Awad. Saya dapati Awad tersebut adalah munasabah dan wajar serta tidak diselubungi dengan ketidaksahan, ketidakwajaran dan prosedur yang betul. Saya bersetuju dengan alasan-alasan yang dinyatakan oleh Responden Kedua dalam pemberian Awadnya.

[25] In this appeal, the appellant is seeking to set aside the decision of the High Court and the award by the Industrial Court.

Issue

[26] The main issues for us to consider are:

(i) whether the occurrence of a fundamental breach of contract of employment is to be gauged by the contract test or by the unreasonableness test;

(ii) whether the High Court Judge had directed herself correctly as to the law on constructive dismissal; and

(iii) whether the transfer was a disguised demotion of the respondent and a fundamental breach of the respondent's contract of employment with the appellant's company.

[27] We have heard and considered both the oral and written submissions of learned counsel. We have given careful consideration to the award of the Industrial Court and the judgment of the High Court.

The Law

[28] Modern employment law is a hybrid of contract and statute. By s. 20 of the Industrial Relations Act 1967, every employee is given the right not to be dismissed without just cause or excuse by his employer. An employee's dismissal could be deemed unfair if the employer does not have a good reason for dismissal or does not follow the company's disciplinary or dismissal process.

[29] What circumstances can bring about a constructive dismissal is not determined by the Act which is silent on the subject, but by case law. The authorities hold that there must be circumstances amounting to a fundamental or repudiatory breach of contract by the employer. It is well settled that an employee may be entitled to claim that he or she was dismissed even though he or she resigned from employment on the ground that the contract of the employer amounted to a repudiatory breach of the contract.

[30] Constructive dismissal arises when an employee is forced to leave the job against their will driven by the employer's conduct. In *Southern Investment Bank Bhd/Southern Bank & Anor v. Yap Fat & Anor* [2017] 8 CLJ 159; [2017] 3 MLJ 327, constructive dismissal occurs when an employee resigns because of his employer's behaviour. In constructive dismissal, the issue is primarily the conduct of the employer and not the conduct of employee - unless waiver, estoppel or acquiescence is in issue. The notion of constructive dismissal comes from the concept that (as it is phrased in United Kingdom): "An employer must not, without reasonable or proper cause, conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee". (See *Courtaulds Northern Textiles Ltd v. Andrew* [1979] IRLR 84, EAT)).

[31] In *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298; [1988] 1 MLJ 92 at 301, Salleh Abas LP explained the meaning of 'constructive dismissal' as follows:

> We think that the word "dismissal" in this section should be interpreted with reference to the common law principle. Thus, it would be a dismissal if an employer is guilty of a breach which goes to the root of the contract or if he has evinced an intention no longer to be bound by it. In such situation the employee is entitled to regard the contract as terminated and himself as being dismissed. (See *Bouzourou v. The Ottoman Bank* [1930] AC 271 and *Donovan v. Invicta Airways Ltd* [1970] Lloyd's LR 486).

[32] In *Bouzourou*'s case, an employee would have been entitled, according to the Privy Council, to regard himself as being dismissed if his transfer from one province to another province rendered him exposed to an immediately threatening danger of violence or disease to his person.

[33] In *Donovan*'s case, the England and Wales Court of Appeal held that when the conduct of the employer was such that it rendered the continuance of the employee's service impossible, the latter was entitled to treat the contract as an end and to obtain damages for wrongful dismissal.

[34] In *Quah Swee Khoon v. Sime Darby Bhd* [2001] 1 CLJ 9; [2000] 2 MLJ 600, this court described 'constructive dismissal' as follows:

> A reading of the pleaded case for the parties resolved the issue that fell for adjudication before the Industrial Court into what the profession has come to call as a "constructive dismissal". There is no magic in the phrase. It simply means this. An employer does not like a workman. He does not want to dismiss him and face the consequences. He wants to ease the workman out of his organisation. He wants to make the process as painless as possible for himself. He usually employs the subtlest of means. He may, under the guise of exercising the management power of transfer, demote the workman. That is what happened in *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92, [1989] 1 CLJ 298 (Rep)]. Alternatively, he may take steps to reduce the workman in rank by giving him fewer or less prestigious responsibilities than previously held. Generally, speaking, he will make life so unbearable for the workman so as to drive the latter out of employment. In the normal case, the workman being unable to tolerate the acts of oppression and victimisation will tender his resignation and leave the employer's services. The question will then arise whether such departure is a voluntary resignation or a dismissal in truth and fact.

[35] Our courts have always held that disguised demotion amounts to constructive dismissal and that it also amounts to a fundamental breach of contract on the part of the employer entitling the employee to resign. In *Quah Swee Khoon v. Sime Darby Bhd* [2001] 1 CLJ 9, Gopal Sri Ram JCA (as he then was) clearly explained the principle (at p. 19):

> An employer does not like a workman. He does not want to dismiss him and face the consequences. He wants to ease the workman out of his organization. He wants to make the process as painless as possible for himself. He usually employs the subtlest of means. He may, under the guise of exercising the management power of transfer, demote the workman. That is what happened in *Wong Chee Hong* (*ibid*). Alternatively, he may take steps to reduce the workman in rank by giving him fewer or less prestigious responsibilities than previously held. Generally speaking, he will make life so unbearable for the workman so as to drive the latter out of employment. In the normal case, the workman being unable to tolerate the acts of oppression and victimization will tender his resignation and leave the employer's services. The question will then arise whether such departure is a voluntary resignation or a dismissal in truth and fact.

[36] Recently, with gratitude, this court can refer the reader to the thoughtful analysis of these principles and test to be applied in constructive dismissal from the recent judgement of this court in the case of *CIMB Bank Bhd v. Ahmad Suhairi Mat Ali & Anor* [2023] 9 CLJ 345; [2023] 5 MLJ 829 where this court held that:

> [74] The concept of constructive dismissal is essentially a situation of 'deemed dismissal'. And this will arise in circumstances where the employer does not overtly dismiss the employee and says or does nothing to communicate to the employee that he is being dismissed but rather, by reason of the employer's singular or cumulative actions or conduct, the employee feels that he has been driven out of employment and therefore dismissed. It is important to emphasise that it is not every shade or facet of the employer's conduct that will give rise to constructive dismissal.
>
> [75] In particular, it is not the employer's unreasonable conduct which is in focus, Rather, the first question is whether the employer's conduct is 'repudiatory' of the contract of employment – the 'contract test'. As such, what is in focus in this concept is the 'employer's conduct' with respect to the particular employee concerned against the backdrop of the employee's contract of employment. Where the employer's conduct is such that it constitutes a significant breach going to the root of a contract of employment and it shows that the employer no longer intends to be bound by one or more of the (express or implied) terms of the contract, an employee is entitled to walk out and treat himself as discharged from any further performance of his obligations, on the ground that he has been 'constructively dismissed'.

[37] It is to be noted that the above passage had referred to the case of *Wong Chee Hong* (*supra*). In *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* [1988] 1 CLJ (Rep) 298; [1988] 1 MLJ 92 Salleh Abas LP, in delivering the unanimous judgment of the Supreme Court, elaborated on the legal principles (at p. 94):

> The issue in this appeal is as stated earlier: whether the concept of constructive dismissal has application to the interpretation of section 20 of our Industrial Relations Act. Therefore we must know and be clear precisely in our mind what constructive dismissal is.

A In England where this expression originated, there had been a great deal of unsettled opinions amongst chairmen of industrial tribunals and also among judges who sat to hear appeals from those tribunals. According to the Court of Appeal in *Western Excavating (ECC) Ltd. v. Sharp* [1978] I R.L.R. 27, it means no more than the common law right of an employee to repudiate his contract of service where the conduct of his employer is B such that the latter is guilty of a breach going to the root of the contract or where he has evinced an intention no longer to be bound by the contract. In such situations, the employee is entitled to regard himself as being dismissed and walk out of his employment.

...

C Thus, in our judgment the transfer, which relegated the applicant to a position of lesser responsibilities, *albeit* on the same terms and conditions of service, which transfer the appellant refused to accept, is a dismissal. It clearly shows that not only the respondent company was displeased with the appellant but it also exhibited the respondent company's intention not to be bound by the contract any longer. Such relegation of D responsibility with its consequent humiliation and frustration and loss of estimation amongst his fellow employees made it impossible for the appellant to carry on being employed under the respondent company's organization. In other words, he had been driven out of his employment. This is therefore dismissal. (See *Cox v. Philips Industries Ltd.* [1975] 1 WLR E 638 and *J.F. Bumpus v. Standard Life Assurance Co. Ltd.* [1974] IRLR 232).

[38] Referring to *Wong Chee Hong*'s case, this court in *CIMB Bank Berhad* reiterated that:

[13] The Supreme Court stated unequivocally that the conduct complained of must be measured against the 'contract test' and not the F 'unreasonableness test'. The practical effect of the contract test may be seen from the Supreme Court's analysis of Cathay's conduct *vis-a-vis* Mr Wong's contract of employment, at p. 96 of the MLJ report where they said:

> There can be no doubt, as found by the Industrial Court, that the G appellant was lawfully doing his duty as the Personnel and Industrial Relations Manager of the respondent company when he negotiated a new collective agreement, represented the respondent company in the negotiations, obtained an award, and implemented it.
>
> H The reward for lawfully performing his duties was not promotion, but a demotion. From being the head of one of the respondent company's departments, he was reduced to a mere cinema manager, a position which he had held some fifteen years ago as a junior executive.
>
> I *No doubt his terms and conditions of service remained unaltered and the transfer was part of the terms of his employment.*

But with respect, we cannot accept that either of these two factors or both of them entitled the respondent company to insist upon the appellant to obey its instruction.

The respondent company must have known that no man worthy of a *minimum self-respect would accept a transfer with a demotion in rank, stripped of all the powers he once enjoyed amongst his fellow employees. This is not a transfer but a demotion, a punishment meted out without any disciplinary action taken*.

What is worse is that it was inflicted not for doing a wrong act, but for doing the right thing – *ie* to negotiate and conclude a new collective agreement, which ended in an Industrial Court award and to implement it. The appellant may well be hasty in that he did not obtain permission from nor consult his superior officer (MD) before implementing the award, but this error in our view hardly justifies sending the appellant down without power and designation. One of the higher interests of law is surely that an order of the court – and this included awards of the Industrial Court – must be obeyed; otherwise the system of justice will be thrown helter-skelter with grave consequences, leading to erosion of public confidence in it.

The respondent company's plea that the appellant's terms and conditions of service remained unaffected, in our view, sounds so hollow that it belies its truth and sincerity. We have perused the award of the Industrial Court and we fully concur with the comments, observation and findings made in the award regarding these two factors. Thus, in our judgment the *transfer, which relegated the applicant to a position of lesser responsibilities, albeit on the same terms and conditions of service, which transfer the appellant refused to accept, is a dismissal*.

It clearly shows that not only the respondent company was displeased with the appellant but it also *exhibited the respondent company's intention not to be bound by the contract any longer. Such relegation of responsibility with its consequent humiliation and frustration and loss of estimation amongst his fellow employees made it impossible for the appellant to carry on beinq employed under the respondent company's organisation. In other words, he had been driven out of his employment*. This is therefore a dismissal.

(emphasis added)

[14] In the case of *Bayer (M) Sdn Bhd v. Anwar Abd Rahim* [1995] MLJU 558; [1996] 2 CLJ 49 (HC) Low Hop Bing JC (as he then was) applied the principle that was enunciated in *Wong Chee Hong* and reiterated that the test in a constructive dismissal case is not the 'test of unreasonableness', but the 'contract test'. The learned judge rendered a lucid explanation on the test and the conditions which must be fulfilled in the following words (pp. 52-53 of the CLJ report):

In my judgment, in order to succeed in a claim for constructive dismissal, the employee must prove to the satisfaction of the court that the employer is guilty of a breach which goes to the root of

A the contract or if the employer has evinced an intention no longer to be bound by it. It is only in such a situation that the employee is entitled to regard the contract as terminated and treat himself as being dismissed. Constructive dismissal does not mean that an employee can automatically terminate the contract when his employer acts or behaves unreasonably towards him. Indeed, if it
B were so, it is dangerous and can lead to abuse and unsettled industrial relations, Thus, it is settled law that the test applicable in a constructive dismissal case is 'the contract test' and not 'the test of reasonableness'. To claim constructive dismissal, four conditions must be fulfilled. These conditions are:

C (1) there must be a breach of contract by the employer;

(2) the breach must be sufficiently important to justify the employee resigning;

(3) the employee must leave in response to the breach and not for any other unconnected reasons; and

D (4) he must not occasion any undue delay in terminating the contract, otherwise he will be deemed to have waived the breach and agreed to vary the contract.

[15] In *Anwar bin Abdul Rahim v. Bayer (M) Sdn Bhd* [1998] 2 CLJ 197; [1998] 2 MLJ 599 (CA) Mahadev Shankar JCA affirmed the decision is the
E 'contract test'.

[16] At pp. 605-606 of the MLJ report Justice Shankar said:

It has been repeatedly held by our courts that the proper approach in deciding whether constructive dismissal has taken place is not
F to ask oneself whether the employer's conduct was unfair or unreasonable (the unreasonableness test) but whether 'the conduct of the employer was such that the employer was guilty of a breach going to the root of the contract or whether he has evinced an intention no longer to be bound by the contract'.

[17] Consequently, that the relevant test for constructive dismissal is the
G 'contract' test and not the 'unreasonableness' test. In this context, the Supreme Court in *Wong Chee Hong* at (p 95 MLJ) stated:

Constructive dismissal does not mean that an employee can automatically terminate the contract when his employer act or behaves unreasonably towards him. Indeed, if it were so, it is
H dangerous and can lead to abuse and unsettled industrial relations.

[39] The two rival tests referred to as the contract test and the unreasonableness test was explained by Lord Denning in *Western Excavating (ECC) Ltd v. Sharp* [1978] IRLR 27. He described the 'contract' test in the following terms (at p. 29, para. 15):

I

> On the one hand it is said that the words of [para. 5(2)(c)] express a legal concept which is already well settled in the books on contract under the rubric "Discharge by breach". If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once.

[40] With regards to the 'unreasonableness' test, Lord Denning described it as follows: (p. 29 para. 16).

> On the other hand, it is said that the words of [para. 5(2)(c)] do not express any settled legal concept. They introduce a new concept into contracts of employment. It is that the employer must act reasonably in his treatment of his employees. If he conducts himself or his affairs so unreasonably that the employee cannot fairly be expected to put up with it any longer, the employee is justified in leaving. He can go, with or without giving notice, and claim compensation for unfair dismissal.

[41] This bring us back to the effect of the Industrial Court decision. We find that the Industrial Court did not apply the contract test. In the present case in the light of the authorities cited above, it had erred to do so.

[42] At the risk of being over-labourious, we should state the Industrial Court's reasoning as follows:

> [24] The Court also finds that having assigned the Claimant to the Ayutthaya Branch, the respondent had not justified to this Court why the Claimant was removed in an unholy haste. The Claimant was given a notice of two weeks to report at the headquarters on 2 March 2015. No reasons were proffered ...
>
> [25] The Court however finds that in the evidence of COW1, it was only after the Claimant was ordered to be repatriated that one Irin Chanonthiensin ("Irin") was appointed as branch manager of the Ayutthaya Brance on 16 March 2015. Even that appointment was about a month after the order to transfer. There are no instructions in the letter of 13 February 2015 for the Claimant to hand over duties to any responsible staff at the branch given that it is a bank. The Court finds this odd as the branch was bereft of a Manager in the interim whilst the Claimant was abruptly ordered home ... This is also notwithstanding the fact that the transfer had nothing to do with any issues of misconduct or performance ...

A [26] The respondent took pains to stress that the assignment was for limited period only but did not deem it fit to put the Claimant on notice that his sojourn in Ayutthaya was pending the recruitment of a local Thai branch manager, neither was evidence led by the respondent to show that Irin had already been shortlisted and with her impending appointment, the Claimant would have no place in the Thai operations So this begs
B question; why the unholy haste? Were there any other reasons? Any decision taken by the management must be above suspicion to satisfy the Court that such exercise was devoid of bad faith.

[27] It is most telling in the letter of transfer to Malaysia that the position to be assumed by the Claimant is nowhere to be found. He is merely
C required to report to the Head of International Infrastructure, PMO and Operations Support where his duties would be outlined later. Upon perusing the Operations Chart of the section, there are three positions reporting to the Head; namely Head, Regional Governance, Supervision & Support, Unit Head of Governance Management and Unit Head of Quality Assurance. The Claimant's post was not clearly stipulated. This
D again shows that the respondent had not demonstrated *bona fide* in exercising its management prerogative. The Claimant is considered to be in a fairly senior position in the bank holding that grade of a Vice President (PG6). Taking the events cumulatively, the Court is of the considered view that the Claimant was driven out of his employment.

E [28] The Court repeats that it is very well aware that matters of transfers are the managements' prerogative. However, it must be vigilant of any oblique motives. Any decision taken by the management must be beyond suspicion to satisfy the Court that such exercise was devoid of bad faith. The Claimant had submitted that case of *Wong Chee Hong* (*supra*) and had drawn parallels with the case before this Court. He argued that the facts
F were similar in that the transfers to a non-defined position and duties and responsibilities with a lower position was in fact a mala fide exercise to drive him out of employment. This Court does not agree that both transfers were non-defined. The transfer to the Ayutthaya Branch was sufficiently defined save for his abrupt removal. However, his second transfer to Malaysia was not sufficiently defined.

G [29] The Claimant in bolstering his position that his duties and functions had been significantly reduced cited the case of *Fact System (M) Sdn. Bhd v. Faridah Rohani* [2006] 4 ILR 2321. The Court finds that the case of *Fact System* (*supra*) can be distinguished as the Claimant in Fact System was stripped off of all responsibilities and authority as a General Manager
H unlike the case before this Court. Nevertheless, the fact that the Claimant was issued a transfer order without specifying his position at the GIB had affected his morale and reputation. The Court also finds that the job scope as a branch manager and at the GIB are significantly different.

I

[43] The Industrial Court went on to say: A

> [30] The Claimant had submitted that the appointment of Marina was a prelude to take the Claimant out of his employment. Unfortunately, the Court must put it on record that the Claimant had never pleaded anything about the appointment of Marina Chin or that such action was tantamount to getting rid of him. B
>
> [31] The Claimant also submitted on the case of *Ngiam Foon v. Mayflower Acme Tours Sdn. Bhd.* [2008] 1 ILR 538 to emphasize its point that the respondent had acte mala fide in the transfer as he was transferred to a lower category. The Court respectfully is unable to agree with the submissions as the case of *Ngiam Foon* (*supra*) can be distinguished. Ngiam Foon was an Executive Director and a General Manager unlike the Claimant. C
>
> [32] It was also the submission of the Claimant relying on the case of *Chong Lee Fah v. New Straits Time Press* [2005] 4 CLJ 605 the right to transfer are not without restrictions as the respondent lacks *bona fide*. Again, the Court is unable to find supporting evidence to substantiate the claim. Further, this point was directed against the appointment of Marina which in any event was not pleaded. D

[44] Paragraph 33 of the Industrial Court's reasons continue in this way:

> [33] The respondent on the other hand submitted that the transfer of a worker is a managerial prerogative citing the case of *Ladang Holyrood v. Ayasamy Manikam & Ors* [2004] 2 CLJ 69, *Ikeda IOM Holdings (M) Sdn. Bhd. v. Gan Poh Jin* [1995] 1 ILR 297 and *Saiful Bahari Abdul Rashid v. Menara Kuala Lumpur Sdn. Bhd* [2012] 2 LNS 0324. The **Court finds that although it is a managerial prerogative, it must be exercised in good faith. None appears to be present here**. The Court finds that the Claimant had proven that the **acts of transferring him were not done *bona fide***. The Court is however in agreement with the respondents' submissions that there are no obligations on its part to consult with the Claimant prior to his transfer. Notwithstanding the non-requirement, COW1 had discussed the transfer with the Claimant prior to it taking place. E F
>
> (emphasis added) G

[45] Based on its reasoning above, the Industrial Court had clearly gone into the *bona fide* and reasonableness of the appellant's conduct instead of considering whether there was a breach of contract when the respondent was transferred by the appellant to GIB.

[46] In the light of the authorities which we have already referred above, we are satisfied that the Industrial Court had erred in law in failing to apply the proper legal test in a case of constructive dismissal. H

[47] The Industrial Court also held that the respondent was constructively dismissed by the appellant based on the ground that the job scope as branch manager in Bangkok and at the GIB are significantly different. I

[48] On this issue, the appellant relied on the evidence of COW1 to support its position that the scope of work that will be assumed by the respondent in GIB is not significantly different from the respondent's role as head, Thailand Operations and his previous experiences. In fact, we note that this evidence remained unchallenged by the respondent.

[49] It is trite that findings of facts made with no evidence to support the same in the decision-making process, are clearly errors of law which warrant those findings being interfered by the higher courts.

Conclusion

[50] The test based on settled principles that was to be applied when assessing a claim for constructive dismissal had not been correctly applied by the Industrial Court and the High Court as set out in its judgement. The correct test to apply is whether there was a fundamental breach of the express or implied terms of the contract of employment.

[51] It is clear that the High Court dismissed the appellant's application for judicial review not because it considered that there had been a fundamental breach of the contract by the employer but because it considered the decision or award by the Industrial Court to be reasonable, not irrational, no procedural impropriety and it is within its jurisdiction.

[52] It is nevertheless arguable, that reasonableness is one of the tools in the Industrial Court's factual analysis kit for deciding whether there has been a fundamental breach. There are likely to be cases in which it is useful. But it cannot be a legal test.

[53] For these reasons, we allowed the appeal and set aside the decision of the High Court.